



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

June 29, 2021

BY EMAIL

Angela Licata
Deputy Commissioner, Sustainability
New York City Department of Environmental Protection
59-17 Junction Boulevard
Flushing, NY 11373
alicata@dep.nyc.gov

Re: Gowanus Canal Superfund Site, Brooklyn, New York
Administrative Order Index No. CERCLA-02-2021-2010

Dear Deputy Commissioner Licata:

The U.S. Environmental Protection Agency (EPA) is in receipt of your letter, dated May 12, 2021, on behalf of the New York City Department of Environmental Protection (DEP) with respect to the above-captioned Administrative Order for Remedial Action, Removal Action, and Remedial Design (Order) issued to the New York City (Respondent or City) on March 29, 2021, and the conference requested by the City pursuant to Paragraph 123 of the Order, and held on April 29, 2021.

We have carefully considered the City's positions as set forth in your letter, in the attachment to Robert Fox's May 5, 2021 email to Brian Carr, and at the conference. EPA responded to many of those positions at the conference, as memorialized in Katherine DeLuca's May 5, 2021 letter.

The City's concerns address a number of interrelated activities necessary for successful remedy implementation, including treatment controls, sampling, reporting, and monitoring. Among those concerns, the City asserts that:

- The Order's requirements regarding treatment units for separate storm sewers, sampling and reporting related to these treatment units, and separating storm sewers are not part of the Combined Sewer Overflow (CSO) remedy selected in the Record of Decision (ROD) and are inconsistent with the National Contingency Plan (NCP).
- The first sentence of paragraph 73.c. exceeds the requirements of the ROD in that, the City asserts, language on page 85 of the ROD, which EPA relies upon for the authority for the first sentence of paragraph 73.c., applies by its terms only to regulation of "additional sewage loads." In contrast, in paragraph 73.c. the Order imposes those

requirements on “stormwater and sewage loads.” Your letter asserts that the addition of “stormwater” is beyond the ROD authority EPA relies upon as the basis in the ROD for paragraph 73.c.

- Paragraph 73.c. of the Order requires that the City ensure implementation of its own regulations. Your letter indicates that the requirement is not within EPA’s power to order.

As described in detail below, the bases for the above-noted provisions in the Order are clearly set forth in the ROD and do not deviate from EPA practices for remedy implementation. EPA strongly disagrees with the City’s overall positions regarding the Order. Further, while EPA believes that the City’s comments challenge certain aspects of the CSO components of the remedy and thus were waived in paragraph 104 of Administrative Order on Consent, Index Number CERCLA-02-2016-2003, issued on June 9, 2016, for the purposes of clarification, without waiving any of its rights, EPA is providing responses to these objections and is amending certain wording of the Order.

Stormwater and Sanitary Sewage are Combined Sewer Loading Components Which Contribute to CSO Discharges and Require Load Control and Treatment

The ROD explicitly addresses the contribution of both sanitary and stormwater loadings to CSO discharges, as well as the need to manage future loadings through not only the CSO Tanks, but also the City’s regulations, through stormwater separation, and through treatment.

The Description of the Selected Remedy states in pertinent part, at pages ii-iii, as follows:

- *Combined sewer overflow (CSO)* controls as discussed below.*

....

NYSDEC is currently overseeing work being performed by New York City (NYC) to reduce CSOs to the canal by approximately 34 percent in middle and lower canal outfalls. To significantly reduce overall contaminated solid discharges to the canal, the selected remedy also includes the following CSO control measures for the upper reach of the canal:

- *Construction of in-line sewage/stormwater retention tanks to retain stormwater which currently discharges through outfalls RH-034 and OH-007. It is estimated that an 8-million gallon tank and a 4-million gallon tank will be required to address CSOs from outfalls RH-034 and OH-007, respectively. In addition, outfalls located in the vicinity of outfalls RH-034 and OH-007 that contribute smaller CSOs will be connected to the retention tanks. The location of the retention tanks will be determined during the remedial design. While the sizes of the tanks will be determined during the remedial design, they are expected to conform with the requirements of the Clean Water Act (CWA) and to accommodate projected additional loads to the combined sewer system that result from current and future residential development, as well as periods of high rainfall, including*

*“Combined sewers receive both sewage and stormwater flows and discharge to the canal when the sewer system’s capacity is exceeded.”

future rainfall increases that may result from climate change.

...

- *Implementation of appropriate engineering controls to ensure that hazardous substances and solids from separated stormwater, including from future upland development projects, are not discharged to the canal.*

Current and future high density residential redevelopment along the banks of the canal and within the sewershed shall adhere to NYC rules for sewer connections (Chapter 31 of Title 15 of the Rules of the City of New York) and shall be consistent with current NYC Department of Environmental Protection (NYCDEP) criteria (NYCDEP, 2012) and guidelines to ensure that hazardous substances and solids from additional sewage loads do not compromise the effectiveness of the permanent CSO control measures by exceeding their design capacity.

The City's objections to the requirement to implement the City's stormwater regulations fail to take into account all of the above language of the ROD. That City requirement was explicitly adopted in the ROD, consistent with CERCLA Section 121(b)(1), 42 U.S.C. Section 9621(b)(1). Our Office of Regional Counsel informs me that the cases referenced in your letter regarding the enforceability of state or local regulations are inapplicable to the CERCLA statutory scheme, for reasons including that CERCLA routinely mandates implementation of environmental requirements of other governments. Further, the City's existing and anticipated stormwater regulations are required by federal and state clean water statutes and are necessary to prevent impacts to the canal remedy.

EPA, therefore, disagrees with the assertion in your letter that "DEP may...require stormwater controls for certain qualifying development where these options are available. However, these are decisions that are within the authority of DEP, not EPA." Page 7. The ROD requirements that the City implement its federally- and state-mandated municipal stormwater regulations are not discretionary once they are adopted in the ROD, much like the non-discretionary ROD requirement to construct and operate the CSO tanks.

EPA's December 2012 Proposed Plan, which the City commented on extensively, also referenced the City's stormwater guidelines, as well as the need for load control and treatment:

Site management controls relating to future sewer capacity would be necessary to maintain the effectiveness of the CSO measures. Specifically, controls would be utilized to ensure that current and future high density residential redevelopment projects along the banks of the canal and within the sewershed would be constructed consistent with current NYC guidelines (NYCDEP, 2012) so as to not contribute sewage discharges to the canal that would result in compromising the remedy. Separated stormwater outfalls may also require discharge treatment controls.

Proposed Plan, Page 27.

As is evident from the above excerpts, the Proposed Plan contained requirements consonant with language that was carried through in the ROD. Absent these operation and maintenance measures for both sanitary and stormwater loads to the CSO system, the CSO reductions of

approximately 34 percent in middle and lower canal outfalls produced by DEP's pump station and force main improvements and relied upon by EPA in the ROD would be eliminated.

Sampling, Data, and Monitoring

As you may be aware, when EPA selects a CERCLA remedy that is implemented by potentially responsible parties (PRPs), the PRPs construct and operate the remedy in lieu of EPA, which, at this site includes infrastructure such as the CSO tanks. Successful remedy implementation involves appurtenant activities, such as data collection and reporting, which the City is in the best position to obtain, notwithstanding that the City has expressed repeated concerns about such data. EPA included explicit data collection and reporting requirements in the Order in part because EPA is statutorily required under CERCLA to make findings on the protectiveness of the remedy not only at the time of remedy selection, but also at other times, including as part of five-year reviews. That data-based review process requires sufficient monitoring of the continued operation and efficacy of the constructed remedy. A comprehensive data set is particularly critical to determining the protectiveness of the CSO remedy selected in the ROD, which addresses the largest inputs to the Canal, namely CSO events and stormwater discharges.

EPA's December 2012 Proposed Plan also addressed the need for five-year reviews and related tracking measures, including the following language: "The reliability of CSO solids control would require regular inspections and maintenance of the controls to ensure that they are operated in accordance with design criteria." Page 26-27.

The importance of this data is also underscored by potential adverse impacts on the CSO remedy from the proposed rezoning of the area and the ongoing delays in the City's implementation of the CSO remedy, as well as the related potential need for CSO maintenance dredging, which the City acknowledged in connection with commencing negotiations for, and in the language of, the 2016 administrative settlement agreement and order on consent entered into between EPA and the City concerning the RH-034 CSO tank. Even though the City has raised concerns about the data that EPA has required, and even though EPA believes all of it is necessary to ascertain the effective implementation of the remedy, EPA has included provisions in the Order as shown below to allow the City to discuss with EPA the form and content of the submission of the various data reports.

Rezoning Impacts on ROD Remedy

EPA disagrees with the City's assertion that monitoring the impacts of future changes in sewer/stormwater loading (such as changes that might result from a proposed rezoning for the Gowanus neighborhood) on the ROD remedy is unnecessary. The ROD clearly establishes that EPA will need to evaluate, and potentially control, such impacts. See, for example, pages ii, 59, 61, 72, 82, 86, 92, and 93 of the ROD.

The City issued the "Gowanus Neighborhood Rezoning and Related Actions Draft Environmental Impact Statement" (DEIS) on April 19, 2021. In EPA's October 27, 2020 letter to DEP and the Director of the Department of Planning regarding the scoping for the DEIS, EPA expressed rezoning-related concerns due to the potential for impacts to the remedy.

Chapter 11 and Appendix F of the DEIS acknowledge the potential for impacts from CSO discharges and stormwater, and reference, among other things, a belief that there are net benefits of compliance with existing and pending City municipal stormwater regulations that will prevent impacts to the canal remedy.

EPA Region 2's Superfund division is evaluating this and other aspects of the DEIS as it may relate to future impacts to the canal remedy. Nonetheless, the ROD and Order provisions for remedy implementation regarding stormwater and sanitary loading, separation, treatment, monitoring, sampling, and reporting are essential to achieving the overall goals of the ROD.

Order Clarifications

For purposes of clarification, this letter makes the following changes to paragraph 73 of the Order (new language is underlined; deleted language is marked with strikeout), which changes are adopted in the enclosed amendment:

- a. CSO Tank Construction: Respondent shall construct the RH-034 Tank and OH-007 Tank following EPA approval of the 100% designs for each respective tank, in accordance with those designs and within the time frames set forth in Appendix B. Any ~~property acquisition locations~~ proposed by Respondent to be used in connection with ~~for~~ the construction of the OH-007 Tank shall be subject to EPA approval, and whatever access or property interest is needed for those EPA-approved locations shall be obtained by Respondent shall be completed so as to meet the time frames set forth in Appendix B.
- b. CSO Tank Operation and Maintenance: Following completion of construction of the RH-034 and OH-007 Tanks, respectively, Respondent shall properly operate and maintain such Tanks. Respondent shall submit to EPA a quarterly report summarizing the operation and maintenance status of such Tanks, including the volume of water treated, the total amount of solids that entered the treatment system, and the amount of solids captured (as weight of materials~~sludge~~ shipped off-~~S~~site). Respondent shall submit the proposed form and contents of the quarterly reports for EPA approval.
- c. Stormwater Controls: Beginning upon the Effective Date of this Order, Respondent shall ensure appropriate implementation of applicable City regulations for sewer connections (Chapter 31 of Title 15 of the Rules of the City of New York) and stormwater control regulations and standards, as set forth in the ROD, ~~at minimum~~, and as may be updated in City regulations and guidelines, for project plan approvals within the Gowanus Canal sewershed, to ensure that hazardous substances and solids from additional stormwater and sewage loads do not compromise the effectiveness of the remedy, and the permanent CSO control measures by exceeding their design capacity. ~~See ROD at page 85.~~ When implementing or approving municipal sewer infrastructure upgrades which discharge stormwater to the Canal, and/or private stormwater controls within the Gowanus Canal sewershed along the banks of the Canal, stormwater shall be separated ~~for discharge to the Gowanus Canal~~ to the maximum extent practicable, and such stormwater discharges shall be treated pursuant to paragraph 73.d., below. Commencing on January 31, 2022, Respondent shall submit to EPA an annual report summarizing the major project plan approvals and completions for the preceding calendar

~~year the net changes in sanitary and stormwater loadings~~ within the Gowanus Canal sewershed, ~~as well as the projected net changes in sanitary and stormwater loadings related to completed projects, which shall include but not be limited to, the major project plan approvals for the preceding calendar year.~~ Respondent shall submit the proposed form and contents of the annual reports for EPA approval.

d. Separated Outfall Treatment Units: Beginning upon the Effective Date of this Order, Respondent shall install, operate and maintain EPA-approved treatment units at all newly constructed or upgraded City-owned separated stormwater outfalls, including street end discharges, at the sSite. ~~Respondent shall continue to operate and maintain any existing treatment units previously installed at City-owned separated storm water outfalls at the Ssite.~~ Respondent shall require the installation, operation, and maintenance of treatment units at all privately owned separated stormwater outfalls at the sSite that are ~~owned by or~~ approved by Respondent after the Effective Date and are not otherwise covered by a NYSDEC discharge permit with discharge limits and treatment. ~~These~~ treatment units ~~required by this subparagraph shall~~should have the capacity to effectively separate oil contamination and capture solids from stormwater runoff, prior to discharging to the Canal. The responsibility to install, operate and maintain EPA-approved treatment units at ~~all~~ separated stormwater outfalls discharging any stormwater from City-owned property or streets may be delegated to private property owners as part of redevelopment plan approvals, but Respondent shall track, oversee and remain responsible for such Work. Commencing on January 31, 2022, Respondent shall submit to EPA an annual report summarizing the location of such treatment units and their maintenance status, including the amounts of oil and solids removed from each unit, and the results of semi-annual testing of the water at the exit point of the treatment units to ensure the functionality of the units. The treatment unit testing shall include solids content, VOCs, SVOCs, and heavy metals. Respondent shall submit the proposed form and contents of the annual reports for EPA approval. Respondent shall request EPA approval for treatment units on a project-by-project basis, or, as appropriate, for a set of standardized units.

e. CSO Solids Monitoring: Respondent shall monitor post-dredging CSO solids contaminant levels pursuant to an EPA-approved Monitoring Plan ("Plan"). The Plan shall include periodic in-Canal monitoring of ~~CSO solids~~surface sediment recontamination levels and annual tracking of CSO solids loading from each CSO outfall, including a detailed description for how the CSO outfall solids loading is calculated~~-, for the purpose of determining whether CSO solids removal will be required to mitigate impacts to sediment from CSO discharges.~~ The Plan shall be submitted for EPA approval by October 31, 2021, and the City shall submit the proposed form and content of the monitoring to be reported pursuant to the Plan for EPA approval at least 60 days prior to this date. In-Canal monitoring consistent with the Plan shall begin one year after EPA notifies Respondent that capping is completed in RTA 1. The CSO solids outfall loading monitoring shall begin ~~on~~as early as June 1, 2022, to establish a baseline for CSO solids loading ~~prior to the buildout of rezoning within the Gowanus Canal sewershed.~~

f. CSO Solids Maintenance Dredging: If EPA so directs, based on the monitoring performed pursuant to paragraph 73.e, Respondent shall perform CSO solids maintenance dredging. Such work shall be performed in accordance with a work plan and schedule approved by EPA. If the CSO solids maintenance dredging results in any damage or impacts to the cap system, Respondent shall be responsible for cap repairs. Respondent shall coordinate and cooperate with respondents to EPA enforcement instruments for implementation of the CSO and in-Canal remedies, including for mitigation and repair of CSO maintenance dredging impacts to the cap.

All other provisions of the Order remain unchanged. EPA anticipates responding further to DEP's letter, as may be appropriate, following the City's submission of its notice of intent to comply with the Order.

The Order as amended shall become effective on June 30, 2021. Pursuant to Paragraph 127, Respondent shall provide written notice to EPA stating whether it will comply with the terms of this Order within seven days after the Effective Date.

Thank you for your attention to this matter. We look forward to working collaboratively on this project with you and your staff.

Sincerely,

Pat Evangelista, Director
Superfund and Emergency Management Division

Enclosure

Gowanus Canal Superfund Site

Amendment to March 29, 2021 Administrative Order for Remedial Action, Removal Action,
and Remedial Design, Index No. CERCLA-02-2021-2010 (Order)

Paragraphs 73.a-f. of the Order are hereby amended as follows:

- a. CSO Tank Construction: Respondent shall construct the RH-034 Tank and OH-007 Tank following EPA approval of the 100% designs for each respective tank, in accordance with those designs and within the time frames set forth in Appendix B. Any locations proposed by Respondent to be used in connection with the construction of the OH-007 Tank shall be subject to EPA approval, and whatever access or property interest is needed for those EPA-approved locations shall be obtained by Respondent so as to meet the time frames set forth in Appendix B.
- b. CSO Tank Operation and Maintenance: Following completion of construction of the RH-034 and OH-007 Tanks, respectively, Respondent shall properly operate and maintain such Tanks. Respondent shall submit to EPA a quarterly report summarizing the operation and maintenance status of such Tanks, including the volume of water treated, the total amount of solids that entered the treatment system, and the amount of solids captured (as weight of materials shipped off-Site). Respondent shall submit the proposed form and contents of the quarterly reports for EPA approval.
- c. Stormwater Controls: Beginning upon the Effective Date of this Order, Respondent shall ensure appropriate implementation of applicable City regulations for sewer connections (Chapter 31 of Title 15 of the Rules of the City of New York) and stormwater control regulations and standards, as set forth in the ROD and as may be updated in City regulations and guidelines, for project plan approvals within the Gowanus Canal sewershed, to ensure that hazardous substances and solids from additional stormwater and sewage loads do not compromise the effectiveness of the remedy, and the permanent CSO control measures by exceeding their design capacity. When implementing or approving municipal sewer infrastructure upgrades which discharge stormwater to the Canal, and/or private stormwater controls along the banks of the Canal, stormwater shall be separated to the maximum extent practicable, and such stormwater discharges shall be treated pursuant to paragraph 73.d., below. Commencing on January 31, 2022, Respondent shall submit to EPA an annual report summarizing the major project plan approvals and completions for the preceding calendar year within the Gowanus Canal sewershed, as well as the projected net changes in sanitary and stormwater loadings related to completed projects. Respondent shall submit the proposed form and contents of the annual reports for EPA approval.
- d. Separated Outfall Treatment Units: Beginning upon the Effective Date of this Order, Respondent shall install, operate and maintain EPA-approved treatment units at all newly constructed or upgraded City-owned separated stormwater outfalls, including street end discharges, at the Site. Respondent shall continue to operate and maintain any existing treatment units previously installed at City-owned separated storm water outfalls at the Site. Respondent shall require the installation, operation, and maintenance of treatment units at all privately owned separated stormwater outfalls at the Site that are

approved by Respondent after the Effective Date and are not otherwise covered by a NYSDEC discharge permit with discharge limits and treatment. The treatment units required by this subparagraph shall have the capacity to effectively separate oil contamination and capture solids from stormwater runoff, prior to discharging to the Canal. The responsibility to install, operate and maintain EPA-approved treatment units at separated stormwater outfalls discharging any stormwater from City-owned property or streets may be delegated to private property owners as part of redevelopment plan approvals, but Respondent shall track, oversee and remain responsible for such Work. Commencing on January 31, 2022, Respondent shall submit to EPA an annual report summarizing the location of such treatment units and their maintenance status, including the amounts of oil and solids removed from each unit, and the results of semi-annual testing of the water at the exit point of the treatment units to ensure the functionality of the units. The treatment unit testing shall include solids content, VOCs, SVOCs, and heavy metals. Respondent shall submit the proposed form and contents of the annual reports for EPA approval. Respondent shall request EPA approval for treatment units on a project-by-project basis, or, as appropriate, for a set of standardized units.

e. CSO Solids Monitoring: Respondent shall monitor post-dredging CSO solids contaminant levels pursuant to an EPA-approved Monitoring Plan ("Plan"). The Plan shall include periodic in-Canal monitoring of surface sediment recontamination levels and annual tracking of CSO solids loading from each CSO outfall, including a detailed description for how the CSO outfall solids loading is calculated, for the purpose of determining whether CSO solids removal will be required to mitigate impacts to sediment from CSO discharges. The Plan shall be submitted for EPA approval by October 31, 2021, and the City shall submit the proposed form and content of the monitoring to be reported pursuant to the Plan for EPA approval at least 60 days prior to this date. In-Canal monitoring consistent with the Plan shall begin one year after EPA notifies Respondent that capping is completed in RTA 1. The CSO solids outfall loading monitoring shall begin as early as June 1, 2022, to establish a baseline for CSO solids loading.

f. CSO Solids Maintenance Dredging: If EPA so directs, based on the monitoring performed pursuant to paragraph 73.e, Respondent shall perform CSO solids maintenance dredging. Such work shall be performed in accordance with a work plan and schedule approved by EPA. If the CSO solids maintenance dredging results in any damage or impacts to the cap system, Respondent shall be responsible for cap repairs. Respondent shall coordinate and cooperate with respondents to EPA enforcement instruments for implementation of the CSO and in-Canal remedies, including for mitigation and repair of CSO maintenance dredging impacts to the cap.

By: _____

PAT EVANGELISTA

Director

Superfund and Emergency Management Division

U.S. Environmental Protection Agency, Region 2

June 29, 2021

Date